

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOW HERBERT and NANCY HERBERT,
Petitioners

*See Vol.
3347*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

RESPONDENT'S SUPPLEMENT TO HIS ORIGINAL PETITION FOR
REHEARING AND FOR CLARIFICATION OF OPINION

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No. 19,935

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To the Honorable, the United States Court of Appeals for the Ninth
Circuit and the Judges Thereof:

Comes now the Commissioner of Internal Revenue, the respondent in the above-entitled cause, by his attorneys, and acting on the permission granted by this Honorable Court in the concurring opinion of Circuit Judge Merrill, filed April 24, 1967, and in the light of such opinion and of the dissenting opinion of District Judge Tavares, filed April 4, 1967, (both dated subsequent to the date of the filing of the respondent's original Petition for Rehearing and for Clarification of Opinion herein), respectfully requests that the following supplementary points or reasons be added, at the place indicated, to his original Petition for Rehearing and for Clarification of Opinion:

1. On page 5, after line 9, add:

5. On the assumption that the partners had agreed during the taxable years to the taxpayer's withdrawal of the funds in issue from the partnership and their deposit in the "Bow Herbert Personal Account", and on the further assumption that the taxpayer made the secret payments to undisclosed recipients (neither

of which assumptions, we submit, is supported by the record), Circuit Judge Merrill concluded (Slip Concurring Op. 2) that the basic question presented was whether the owners of the business or the individual who is directly responsible for making the payments should bear the tax consequences of the fact that such payments were not deductible. Casting the issue in these terms is unsound not only because the factual premises are erroneous but also because it conflicts with the cases decided by this Court and other courts, cited above, (see also Wilson v. United States and Nelms v. United States, consolidated, (M.D. Tenn.), decided August 25, 1965 (16 A.F.T.R. 2d 5608)) which show that it is incumbent on a taxpayer receiving funds under the circumstances of this case to make a disclosure of what he did with those funds. Otherwise, he has not met the burden of proof incumbent upon him. One of the consequences of Circuit Judge Merrill's analysis would be, in the case of an exempt organization, such as a union, if an individual were authorized to make secret payments to undisclosed recipients, under the theory advanced by Circuit Judge Merrill, neither the exempt organization nor the individual distributing the funds would be taxable where the individual spent the money for personal purposes but declined to account for the expenditure.

6. We further respectfully submit that Circuit Judge Merrill's concurring opinion has erred in giving weight to the so-called "1961 settlement" agreement (see Slip Concurring Op. 2) as establishing that the owners of the business rather than the taxpayers should bear the tax consequences of the amounts here in issue which the taxpayer withdrew from the partnership and added to his "Bow Herbert Personal Account" without any accounting therefor. As District Judge Tavares' dissenting opinion points out (Slip Dissenting Op. 8-10), the record fails to show the existence during the taxable years ending September 30, 1958, September 30, 1959, and September 30, 1960, of an "agreement between all the partners purporting to authorize * * * [the taxpayer's] secretive practices and expenditures". The so-called "1961 settlement" agreement was entered into after the years here in issue before this Court. The Tax Court, we respectfully submit, properly did not consider its effect on the issue before this Court. Moreover, as discussed by District Judge Tavares in his dissenting opinion (Slip Dissenting Op. 10), there is great doubt as to the arms'-length nature of this so-called "1961 settlement" agreement between the taxpayer and his partners. After discussing various aspects of the so-called "1961 settlement" District Judge Tavares justifiably states (Slip Dissenting Op. 10), "In other words, Bow Herbert in effect bought them out and stifled their objections to non-disclosure by making huge concessions in other respects."

2. On page 5, the concluding paragraph of the original Petition for Rehearing and Clarification of Opinion should be deleted and the following inserted:

Wherefore, in view of the foregoing, the Commissioner respectfully requests that his original Petition for Rehearing, as supplemented herein, be granted by this Honorable Court, and that the majority and concurring opinions filed, respectively, on December 30, 1966, and April 24, 1967, and the judgment entered April 24, 1967, in this cause be vacated and set aside, and that a rehearing be granted; and further, the Commissioner respectfully requests that the opinions of this Court heretofore filed be clarified in the respects set forth above.

Respectfully submitted,

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Assistant Attorney General.

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Attorneys,
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Washington, D. C. 20530.

May, 1967

CERTIFICATE OF COUNSEL

The undersigned, attorney for the Commissioner of Internal Revenue, respondent herein, hereby certifies that the foregoing Supplement to the Commissioner's original Petition for Rehearing and for Clarification of Opinion, is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded and proper to be filed herein.

MITCHELL ROGOVIN,
Assistant Attorney General.

